82 - 1807

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALBERT SHIELDS, JR., HEIR OF
ALBERT SHIELDS, SR., et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,
et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CRAIG J. TILLERY
615 H Street, Suite 100
Anchorage, Alaska 99501
(907) 272-9431

Counsel for Petitioners

May 4, 1983

QUESTIONS PRESENTED

1. Did the court of appeals err in concluding that an Alaska Native, whose parents and grandparents intensively used a small parcel of land long prior to a national forest withdrawal and who himself used the land since a time eleven years subsequent to the withdrawal, could not receive a trust allotment for the land where the applicable statute stated that an allotment is permitted in a national forest "if founded on occupancy of the land prior to the establishment of the particular forest?"

2. Did the decision of the court of appeals violate rules of statutory construction expressed by this Court in *Udall v. Tallman*, 380 U.S. 1 (1965), and *Watt v. Alaska*, 451 U.S. 259 (1981), by:

(a) refusing to defer to the contemporaneous construction of a statute by high officials charged with its administration because that construction was not "published," and

(b) deferring to non-contemporaneous construction by an intra-agency review board which conflicted with prior contemporaneous construction by the agency?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — *Page*

TABLE OF AUTHORITIES - Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No.

ALBERT SHIELDS, JR., HEIR OF
ALBERT SHIELDS, SR., et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,
et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Albert Shields, Jr., heir of Albert Shields, Sr., for himself and on behalf of a certified class of over 200 Native allotment applicants,[1] respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 7, 1983.

OPINIONS BELOW

The opinion of the court of appeals, reported at 698 F.2d 987 (9th Cir. 1983), appears in the Appendix hereto at App. 2a-9a. The opinion of the District Court for the District of Alaska is reported at 504 F. Supp. 1216 (D. Alaska 1981). The administrative decision is reported at 23 I.B.L.A. 188 (Jan. 5, 1976).

JURISDICTION

The judgment of the court of appeals was first entered on November 10, 1982. A timely petition for rehearing was filed with that court. On February 7, 1983, the court of appeals withdrew its earlier memorandum decision and substituted a new opinion. At the same time it denied the petition for rehearing. This petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2 of the Alaska Native Allotment Act, 34 Stat. 197 (1906) as amended by the Act of August 2, 1956, 70 Stat. 954

---

[1] The class is defined at App. 4a. Respondent parties not listed in the caption include the Secretary of the United States Department of the Interior and the Secretary of the United States Department of Agriculture.

(formerly codified at 43 U.S.C. § 270-2 (1970)), repealed but with a savings clause for pending applications, 43 U.S.C. § 1617 (Supp. 1982):[2]

> Allotments in national forests may be made under this Act if founded on occupancy of the land prior to the establishment of the particular forest or if the Secretary of Agriculture certifies that the land in an application for an allotment is chiefly valuable for agricultural or grazing purposes.

STATEMENT OF THE CASE

Albert Shields, Sr. was an Alaska Native, born January 25, 1915. App. 3a. This petition concerns his application under the Alaska Native Allotment Act for an allotment of 160 acres of land within the exterior boundaries of the Tongass National Forest.

The land for which Albert Shields applied—located on the Thorne Arm of Revillagigedo Island—was withdrawn by Presidential Proclamation on February 16, 1909. 35 Stat. 2226 (1909). The parcel of land had been used by his ancestors and forebears in the Bear and Wolf Clans since the 1700's. CR 27, ex. 7.[3] In the nineteenth century his grandfather lived on the land, where he built a smokehouse and log cabin. Similarly, his mother and father lived and subsisted on the land. CR 27, ex. 8. Albert Shields, Sr. began to use the land in 1920 at the age of five. *Id;* App. 3a. From that time until ill health confined him to his home in 1976, he used the land seasonally for trapping, fishing, hunting, and picking berries. CR 27, ex. 7. Since 1976 the land has been used in the same way by his sons. *Id.*

---

[2] The entire text of the Alaska Native Allotment Act, as amended, is set out in the Appendix at 10a.

[3] "CR" references the portion of the clerk's record on file with the Ninth Circuit where the factual support for a particular statement may be found.

Under the 1956 amendments to the Alaska Native Allotment Act, an allotment is permitted on national forest land "if founded on occupancy of the land prior to the establishment of the particular forest." Act of August 2, 1956, 70 Stat. 954. Petitioners contend that by this language Congress intended to permit allotments on land within national forests where the applicant could demonstrate an unbroken chain of Native use and occupancy of the particular parcel of land since a date prior to the forest withdrawal. Although the government agreed with this construction at the time of enactment of the statute, it has, since the mid-1970's, permitted allotments only where the applicant could demonstrate personal use prior to the withdrawal. This lawsuit will determine the proper construction of that phrase and thus the fate of the allotment applications of Albert Shields, Sr. and some 200 other Native applicants.

The Alaska Native Allotment Act as enacted in 1906 provided simply that an Alaska Native, who was 21 years of age and a resident of the territory, was entitled to apply for an allotment of 160 acres of non-mineral land. The allotted land was to be inalienable and nontaxable. Though the Act worked after a fashion, the provision regarding alienation created difficulties. It tended to render the property worthless where the allottee moved or where he died and the heirs did not wish to live on the property. H.R. Rep. No. 2534, 84th Cong., 2d Sess. 2-3 (1956) (hereinafter "House Report"). To remedy this problem a bill was proposed in 1956 to provide for the alienation of Native allotments with the approval of the Secretary of the Interior. *Id.* Accordingly, on April 16, 1956, House Bill 10505, which addressed only the issue of alienation, was introduced by Delegate Bartlett of Alaska.

The House Subcommittee on Territories, however, apparently feared that permitting alienation might encourage some Natives to *seek* allotments in the national forests for the purpose of selling them. Therefore it proposed a "clean" bill which included amendments designed to obviate that concern. House Report at 3; *see* H.R. 11023, 84th Cong., 2d Sess. (1956).

Upon review the Department of the Interior recommended a substitute bill,[4] which it felt addressed the subcommittee's concerns with more technical precision. Letter of June 7, 1956, House Report at 3-4. This bill, H.R. 11696 (CR 27, ex. 15), was adopted as proposed and became law. 102 Cong. Rec. 13,916 (1956).

In sections 2 and 3 of the enacted bill, Congress provided:

> Sec. 2. Allotments in national forests may be made under this Act if founded on occupancy of the land prior to the establishment of the particular forest or if the Secretary of Agriculture certifies that the land in an application for an allotment is chiefly valuable for agricultural or grazing purposes.
>
> Sec. 3. No allotment shall be made to any person under this Act until said person has made proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of five years.

Act of August 2, 1956, 70 Stat. 954.

The legislative history relating specifically to the language of these two sections is relatively brief. The Department of the Interior, in its June 7, 1956, letter accompanying the proposed bill, stated:

> Subsection (e) of the enclosed substitute bill [Sections 2 and 3 of the amendatory Act] contains the subcommittee recommendations that are designed to safeguard the national forests. Some fear was expressed during the subcommittee hearings that the

[4] The text of the substitute bill, which includes the phrase at issue in this lawsuit, was suggested in a May 23, 1956 Memorandum from the Director of the Bureau of Land Management to a Mr. Sigler, legislative counsel in the Office of the Solicitor.

> authority to sell homesteads might encourage Indians and Eskimos to seek homestead allotments in the national forests for the purpose of selling them to others. This danger is effectively obviated by enacting into law the substance of the Department's present regulations on the subject, which prohibit homestead selections in the national forests unless they are founded upon occupancy of the land prior to the establishment of the forest, or unless the land selected is determined by the Secretary of Agriculture to be chiefly valuable for agricultural or grazing purposes, and which require the homesteader to prove 5 years' occupancy of the land.

House Report at 4.

The House Report which accompanied House Bill 11696 followed the sense of the Department's letter by stating that the provisions of subsection (e) were necessary to protect the national forests:

> Subsection (e) safeguards the national forests by enacting into law the substance of present regulations which prohibit homestead selections in the national forests unless they are founded upon occupancy of the land prior to the establishment of the forest, or unless the land selected is determined by the Secretary of Agriculture to be chiefly valuable for agricultural or grazing purposes, and which require the homesteader to prove 5 years' occupancy of the land.

House Report at 2.

In the Senate the bill was referred to the Committee on Interior and Insular Affairs. *See* S. Rep. No. 2696, 84th Cong., 2d Sess. (1956). That Committee neither debated nor even mentioned the phrase at issue in this lawsuit. CR 27, ex. 12. The Senate Committee Report repeated verbatim the House Report

except that in an introductory paragraph, the Report stated, "[a]llotments may be made in national forests if the land is chiefly valuable for agriculture or grazing purposes, or if the native had occupied the land prior to the establishment of the forest." S. Rep. No. 2696, 84th Cong., 2d Sess. 1 (1956).

The departmental regulation which House Bill 11696 intended to enact into law was construed by the Department of the Interior only one time prior to 1956. App. 7a. In the *Application of Jack Gamble,* BLM File A-17456, the Director of the Bureau of Land Management[5] ruled, on appeal, that an application was founded on occupancy prior to the establishment of the forest where the applicant could show that he and his ancestors had used the land in a direct and continuous chain of occupancy since a time before the forest was withdrawn. CR 27, ex. 25, at 22. In his own case Jack Gamble showed a chain stretching back to a time prior to the forest withdrawal which included his mother, her aunt, and his father. *Id.*

In the years immediately subsequent to enactment of the 1956 amendments, the Department of the Interior ruled in only two cases which required construction of the statutory language at issue here. In each case the Department permitted an allotment, if founded on occupancy by the applicant and his direct ancestors since a time prior to establishment of the forest. *See Application of Charles G. Benson,* BLM File J-011549, and *Application of John Littlefield,* BLM File J-010699, CR 27, ex. 26, 27.

Approximately twenty years after enactment of the 1956 amendments, the Department of the Interior issued a series of decisions which adopted the opposite view—that the applicant must personally occupy the land prior to the establishment of the forest. App. 7a. Among these decisions, which are all the subject of this lawsuit, was the case of Albert Shields, Sr.

---

[5] Though holding the same office, this was a different individual than the Director who proposed the language adopted by Congress in the 1956 amendments. *See supra* note 4.

On April 17, 1972, the Bureau of Indian Affairs filed a Native allotment application on behalf of Albert Shields, Sr. A field examination was made by the Bureau of Land Management ("BLM") in 1974. Although the examiner found that Mr. Shields had used the land extensively,[6] he found that his *personal use* did not predate the 1909 withdrawal. CR 27, ex. 4. Accordingly, the BLM rejected the application.

On appeal, the Interior Board of Land Appeals acknowledged Mr. Shields' extensive use, but denied his claim because, "[u]nfortunately, the law was so framed that appellant's use does not qualify him for an allotment." *Albert Shields, Sr.*, 23 I.B.L.A. 188 (Jan. 5, 1976). In a series of consolidated decisions issued in the mid-1970's, almost 200 allotments, including virtually every pending application in Southeast Alaska,[7] were similarly denied. *See* App. 7a.

This action was filed in federal district court on February 23, 1977. App. 3a. Jurisdiction was conferred by 28 U.S.C. § 1353 (1976) and 25 U.S.C. § 345 (1963). On January 9, 1981, the District Court for the District of Alaska granted summary judgment for the government, holding that Alaska Natives applying for allotments within a national forest under the 1906 Act must demonstrate personal, rather than ancestral, occupancy of the land prior to the establishment of the forest. *Shields v. United States,* 504 F. Supp. 1216 (D. Alaska 1981).

---

[6] The field examiner stated in his report:

> I examined this case and believe the applicant has used the subject land and if any native of Alaska deserves an allotment, Albert Shields, Sr., *does.*

CR 27, ex. 4, at 2 (emphasis in original).

[7] A few applicants are sufficiently old that their use may qualify them for an allotment, even under the government's construction. For example, the BLM recently issued a Contest Complaint against Annie Bennett, asking her to prove personal use and occupancy prior to a forest withdrawal. BLM File AA-7017; *see also* Annie Bennett (On Reconsideration), 61 I.B.L.A. 282 (Feb. 2, 1982). Mrs. Bennett is 86 years old. *Id.*

On appeal the Court of Appeals for the Ninth Circuit affirmed. App. la-9a. In affirming the district court, the Ninth Circuit first found that the language of the 1956 amendments was ambiguous. App. 5a. The court then held that administrative interpretations of the statutory language at issue, which were consistent with petitioners' claims and which were made at the time of the statute's enactment, were not due deference because they were unpublished. App. 7a. The court further held that administrative interpretations made twenty years after enactment of the statute were due deference because they were published. App. 8a. Finally, the court stated that a phrase contained in the Senate Report on the Act "indicates that personal, rather than ancestral, use is required." App. 6a.

REASONS FOR ISSUING THE WRIT

Certiorari should be granted to review the decision of the Ninth Circuit Court of Appeals because that decision conflicts with settled law as expressed in the decisions of this Court and because this case raises an important federal question deserving this Court's attention.

I. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

In its opinion the court of appeals expressly acknowledged that in *every* instance in which the Department of the Interior interpreted the phrase "founded on occupancy," either shortly prior[8] or subsequent to enactment of the 1956 amendments, the Department adopted the construction sought by Mr. Shields. App. 7a. Nevertheless, the court refused to defer to this administrative interpretation because the departmental actions "were unpublished and of little precedential value."

---

[8] Departmental interpretation prior to enactment of the law is relevant because Congress expressly intended to enact the substance of existing administrative regulations. House Report at 4.

Id. Instead, the court chose to defer to the non-contemporaneous, but published, decisions of an administrative review board not even in existence at the time of enactment of the 1956 amendments. By this holding the court of appeals has substantially altered and narrowed this Court's rules of statutory construction that a court should defer to the interpretation given a statute by the officers or agency charged with its administration and should give "controlling weight" to administrative construction of a regulation of the agency. *Udall v. Tallman,* 380 U.S. 1, 16 (1965).

The rule that courts should defer to the contemporaneous and practical interpretation of a statute or regulation by those officials charged with its administration is longstanding. *See Edwards's Lessee v. Darby,* 25 U.S. (12 Wheat.) 131, 133 (1827); *United States v. Moore,* 95 U.S. 760, 763 (1877); *Brown v. United States,* 113 U.S. 568, 571 (1885); *United States v. Hill,* 120 U.S. 169, 182 (1887). It has been utilized in every federal circuit court and by virtually every state court. *See* 2A C. Sands, *Sutherland Statutory Construction* § 49.03, n.1 (4th ed. 1973) and cases cited therein. The utility of this rule has not diminished in recent years. *See, e.g., Blum v. Bacon,* _____ U.S. _____, 102 S. Ct. 2355 (1982); *United States v. Clark,* 454 U.S. 555 (1982); *Watt v. Alaska,* 451 U.S. 259 (1981). The decision of the court of appeals does not abolish this rule—indeed the decision purports to follow the rule—yet it alters the application of the rule in a fundamental way.

The rule that courts should defer to contemporaneous administrative interpretation was born of practical necessity. Courts cannot delve into the minds of legislators to ascertain their intent. Therefore, where the language of a statute is ambiguous, the court must resort to extrinsic aids. The contemporaneous and practical interpretation of a statute given by those who execute it has therefore been given great weight in such instances. Note, *The Supreme Court on Administrative Construction As A Guide In The Interpretation Of Statutes,* 40 Harv. L. Rev. 469, 470 (1926-27). This deference is based

on the court's belief that legislative inaction in the face of executive action is an implicit recognition of the validity of the interpretation; that the officials involved are usually able men, with expertise in the area; that they are frequently draftsmen of the legislation they later enforce; and that the public has relied on their interpretation and governed its affairs accordingly. *Id.; see Robertson v. Downing,* 127 U.S. 607, 613 (1888); *Hahn v. United States,* 107 U.S. 402, 406 (1882); *United States v. Moore,* 95 U.S. 760, 763 (1877).

Initially the application of this rule of construction was based primarily upon the unpublished and practical construction of statutes by those officials who actually implemented the statutes. *See, e.g., United States v. Hill,* 120 U.S. 169, 182 (1887); *Brown v. United States,* 113 U.S. 568, 571 (1885); *United States v. Moore,* 95 U.S. 760, 763 (1877); *Edwards's Lessee v. Darby,* 25 U.S. (12 Wheat.) 131, 133 (1827).

In recent years, the proliferation of formal rulemaking and intra-agency appellate boards has resulted in a great deal of formal published interpretations of statutes by agencies. The courts have generally deferred to these forms of agency action as well. *See, e.g., Blum v. Bacon,* _____ U.S. _____, _____, 102 S. Ct. 2355, 2361 (1982); *Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555, 566 (1980); *Trans Alaska Pipeline Rate Cases,* 436 U.S. 631, 648 (1978). Nevertheless, unpublished agency practice continues to be recognized as a legitimate aid to statutory construction.[9] *See, e.g., Quern v. Mandley,* 436 U.S. 725, 738 (1978); *Trafficante v. Metropolitan Life Insurance Co.,* 409 U.S. 205, 210 (1972); *Udall v. Tallman,* 380 U.S. 1, 16 (1965). For example, in *Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649, 660 (1976), this Court found an unpublished practice—the wording of allotment trust patents—to be due deference.

[9] Ironically, the very case to which the court below cited in holding that where it can defer to published administrative interpretation it need not apply the canon of liberal construction, was a case in which the court relied on unpublished administrative practice discovered by examination of the public land records. *Compare* App. 8a *with* Assiniboine & Sioux Tribes v. Nordwick, 378 F.2d 426, 431-32 (9th Cir. 1967), *cert. denied,* 389 U.S. 1046 (1968).

By its decision in this case, the Ninth Circuit has held that contemporaneous but unpublished practice must give way to a subsequent non-contemporaneous practice solely because that later practice was formally published.[10] This ruling gives a dignity and importance to the formal publication of decisions by intra-agency appellate boards which neither this Court nor any circuit court has previously given. It in fact directly contravenes this Court's decision in *Watt v. Alaska*, 451 U.S. 259, 272 (1981), where the Court specifically found that an unpublished agency practice, contemporaneous with the enactment of a statute, was entitled to greater deference than the published formal decision of the Department ten years later. *Cf. General Electric Co. v. Gilbert*, 429 U.S. 125, 140-42 (1976).

If left to stand, the decision of the Ninth Circuit will encourage and permit succeeding administrations to manipulate the meaning of past congressional enactments by construing those enactments with more formality than had been done in the past. It will subvert the logical basis for the rule of deference to administrative practice and may ultimately serve to destroy its persuasiveness.

II. THIS CASE RAISES AN IMPORTANT FEDERAL QUESTION DESERVING THIS COURT'S ATTENTION

In its opinion, the Ninth Circuit determined that the phrase "founded on occupancy of the land prior to the establishment of the particular forest" required an allotment applicant to prove personal, rather than ancestral, use of the land prior to the forest withdrawal. Because most of the forest land at issue was withdrawn by 1909, this ruling effectively means

[10] The administrative decision in the case of Jack Gambell to which the court of appeals would not defer was made on appeal by the highest official of the BLM. It was not published because no automatic mechanism for publication existed. Neither the contemporaneous decisions nor the later decisions to which the court did defer were published in Public Lands Decisions volumes.

that only a handful of very old Alaska Natives in Southeast Alaska will have a chance of obtaining a trust patent to the land which they and their forebears have used and occupied for generations.

Traditionally this Court has taken a strong interest in Indian allotment issues, finding them to be worthy of review even when they focus on narrow interpretive issues of a statute. *See, e.g., Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649 (1976); *United States v. Jackson,* 280 U.S. 183 (1930); *United States v. Payne,* 264 U.S. 446 (1924); *LaRoque v. United States,* 239 U.S. 62 (1915). This interest is well deserved, for a claim to land historically used by Indian people is an issue of great importance. Such land is both a link to the past and the cornerstone of the future of a people. It is inextricably bound up in their culture and their way of life.

These considerations are present in this case. The land which the applicants seek is by definition land upon which they have built cabins, smokehouses, and fish racks; land which they use for hunting, fishing, trapping, and other subsistence activities. It is, moreover, land which, again by definition, has been used by their parents, grandparents, and other forebears in similar ways. Finally, it is land and a way of life which, like the late Albert Shields, Sr., they seek to offer to their children.

One measure of the importance of these allotments can be found in Joint Resolve 34 of the Alaska State Legislature. Recent years have frequently found Indians and state governments in bitter confrontation with each other over land and treaty claims. Yet in 1981 a unanimous Alaska Legislature took the unusual step of passing a joint resolution stating the legislature's support for allotments on lands traditionally used by Alaska Natives and urging the Secretary of the Department of the Interior to resolve "equitably and expeditiously" the allotment applications at issue in this lawsuit. Alaska J. Res. 34, 12th Leg., 1981 Alaska Sess. Laws.

Thus even were the statutory issue in this case determined to be a narrow one, limited in effect to a few hundred allotments in the national forests,[11] petitioners submit that the issue is an important one, deserving of this Court's attention.

Moreover, it is not clear that the opinion of the court of appeals is so limited. In its memorandum in support of its cross-motion for summary judgment in *Akootchook v. Watt,* No. F-82-4 (D. Alaska, filed Jan. 15, 1982), the United States has argued that the court's construction of the phrase "founded on occupancy" in *Shields* is controlling on the question of whether members of a class in excess of 150 applicants are entitled to allotments in other types of federal withdrawals. If the district court agrees, the ruling will impact allotment claims in still other withdrawals. Review by this Court will therefore have a legal impact far beyond the confines of this particular case and may well determine the legal status of a broad range of Native allotment cases in Alaska.

CONCLUSION

For these reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CRAIG J. TILLERY
615 H Street, Suite 100
Anchorage, Alaska 99501

Counsel for Petitioners

May 4, 1983

---

[11] The amount of land at stake in this lawsuit, a maximum of 32,000 acres, is admittedly not large when viewed against the total of 23,000,000 acres in the Tongass and Chugach Forests. Yet when viewed in the context of the individual applicants who use the land for their subsistence, it may well represent all that they have in life.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALBERT SHIELDS, JR., Heir of Albert Shields, Sr., et al.,	)	No. 81-3120
	)	DC No. A-77-66 CIV
Appellants,	)	
vs.	)	ORDER
UNITED STATES OF AMERICA, et al.,	)	(Filed Feb. 7, 1983)
Appellees.	)	

Appeal from the United States District Court
for the District of Alaska
James M. Fitzgerald, District Judge, Presiding

Before WRIGHT, SKOPIL, and ALARCON, Circuit Judges

The Clerk is directed to withdraw the prior memorandum decision of November 10, 1982 in this case and substitute the attached opinion. Appellants' petition for rehearing and suggestion for rehearing *en banc* is denied with leave to refile based upon the substitute opinion.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALBERT SHIELDS, JR., Heir of Albert Shields, Sr., et al.,	)	No. 81-3120
	)	DC No. A-77-66 CIV
Appellants,	)	
vs.	)	
UNITED STATES OF AMERICA, et al.,	)	OPINION
	)	(Filed Feb. 7, 1983)
Appellees.	)	

Appeal from the United States District Court
for the District of Alaska
James M. Fitzgerald, District Judge, Presiding

Argued and submitted June 8, 1982

Before: WRIGHT, SKOPIL, and ALARCON, Circuit Judges

SKOPIL, Circuit Judge:

Appellant class, approximately 200 applicants for allotments under the 1906 Alaska Native Allotment Act, appeal a district court decision holding that the Allotment Act requires the applicant to establish personal, rather than ancestral, use and occupancy of the land prior to its withdrawal for national forests. We affirm.

I.

In 1906 Congress passed the Alaska Native Allotment Act, Pub. L. No. 171, 34 Stat. 197 (amended 1956, repealed 1971), which authorized the Secretary of the Interior to grant Alaska

Natives allotments of up to 160 acres. In 1956 Congress amended the Allotment Act. Act of Aug. 2, 1956, Pub. L. No. 931, 70 Stat. 954 (codified at 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed 1971)) ("Allotment Act").[1] The text of the 1906 Allotment Act became section 1, and was amended to allow alienation. Section 2 provided that allotments in national forests could be made

> "if founded on occupancy of the land prior to the establishment of the particular forest or if the Secretary of Agriculture certifies that the land in an application for an allotment is chiefly valuable for agricultural or grazing purposes."

Section 3 provided that no allotment (whether in or outside a national forest) could be made except on proof of five years "substantially continuous use and occupancy" by the applicant.

On December 13, 1971 Albert Shields, Sr. filed an application for an allotment of 160 acres of land presently within the Tongass National Forest. The land for which he applied had been withdrawn for national forest use by presidential proclamation on February 16, 1909. Mr. Shields alleged that his grandfather had lived on this land beginning in the 1850's. Mr. Shields was born in 1915, and his use of the land began in 1920. The BLM rejected Mr. Shields' application for allotment because he had failed to demonstrate either personal use prior to the withdrawal or that the land was chiefly valuable for agricultural grazing purposes. The Interior Board of Land Appeals ("IBLA") rejected Mr. Shields' appeal for the same reasons. 23 IBLA 188 (January 5, 1976).

Mr. Shields filed this action in district court in the District of Columbia on February 23, 1977 to review the IBLA denial of the application for allotment. The case was transferred to the District of Alaska on motion of the United States. The

---

[1] The allotment Act was repealed by section 18 of the Alaska Native Claim Settlement Act ("ANCSA"), 43 U.S.C. § 1617, with a savings clause for applications pending on December 18, 1971. 43 U.S.C. § 1617(a).

plaintiff, Albert Shields, Sr., died on November 13, 1977 and Albert Shields, Jr. was substituted as plaintiff.

The district court certified a plaintiff class of all Alaska Natives who had made timely application for allotments under the Alaska Native Allotment Act for land located within a national forest whose applications had been denied on the grounds that they cannot establish personal occupancy of that land prior to the forest withdrawal. Both sides filed cross-motions for summary judgment.

On January 9, 1981 the district court granted the government's motion for summary judgment and held that Alaska Natives applying for allotments within a national forest under the 1906 Alaska Native Allotment Act must establish personal, rather than ancestral, use and occupancy of the land prior to establishment of the national forest. *Shields v. United States*, 504 F. Supp. 1216 (D. Alaska 1981).

II.

The sole issue before us is whether Alaska Natives applying for allotments within a national forest under the Alaska Native Allotment Act must establish personal, rather than ancestral, use and occupancy of the land prior to establishment of the national forest.

III.

Section 2 of the Alaska Native Allotment Act, as amended in 1956, provides:

> "Sec. 2. Allotments in national forests may be made under this Act if *founded on occupancy of the land prior to the establishment of the particular forest* or if the Secretary of Agriculture certifies that the land in an application for an allotment is chiefly valuable for agricultural or grazing purposes."

43 U.S.C. § 270-2 (1970) (repealed 1971)(emphasis added). The government contends the statute requires that the applicant must personally have occupied the land prior to the withdrawal; appellant claims that occupancy by a direct ancestor is sufficient.

In interpreting statutes the court's objective is to ascertain the intent of Congress. *Philbrook v. Glodgett,* 421 U.S. 707 (1975). The primary rule of statutory construction is to ascertain and give effect to the plain meaning of the language used. *Hughes Air Corp. v. Public Utilities Comm.,* 644 F.2d 1334 (9th Cir. 1981). The language of the statute, however, does not aid our search for congressional intent. The statute does not indicate whether personal or ancestral occupancy is required.

Appellants argue that unless section 2 is read to require only ancestral occupancy, the additional requirement of five years use and occupancy in section 3 would be rendered meaningless, in violation of the rule of statutory construction that one provision should not be interpreted in a way which is internally contradictory or that renders other provisions of the same statute inconsistent or meaningless. *Hughes Air Corp., supra,* at 1337; *Jacobson v. Rose,* 592 F.2d 515 (9th Cir. 1978), *cert. denied,* 442 U.S. 930 (1979); *Patagonia Corp. v. Board of Governors of Federal Reserve System,* 517 F.2d 803 (9th Cir. 1975). This argument is meritless. The section 3 five year occupancy requirement applies to allotments under both sections 1 and 2. Section 1 authorizes allotments from any public lands in Alaska, while section 2 authorizes allotments under specific conditions from national forest lands. Thus, the personal occupancy requirement of section 3 has meaning as applied to section 1 allotments, regardless of the interpretation of section 2.

Because the language of the statute does not reveal congressional intent, we must look to the legislative history. *Heppner v. Alyeska Pipeline Service Co.,* 665 F.2d 868 (9th Cir.

1981). The 1956 amendments to the 1906 Alaska Native Allotment Act began as a House bill, HR 11696. The House Report states that sections 2 and 3 "[safeguard] the national forests by enacting into law the substance of present regulations which prohibit homestead selections in the national forests unless they are founded upon occupancy of the land prior to the establishment of the forest...." H.R. Rep. No. 2534, 84th Cong., 2d Sess. 2 (1956) [hereinafter cited as House Report]. Congress was concerned that the 1956 amendments which permitted alienation of allotments would allow some natives to secure land in National Forests for the purpose of selling it. *Id.*

The Senate Report clearly states that "[a]llotments may be made in the national forests...*if the native had occupied* the land prior to the establishment of the forest." S. Rep. No. 2696, 84th Cong., 2d Sess. 1, *reprinted at* 1956 U.S. Code Cong. & Ad. News 4201, 4202 (emphasis added). This indicates that personal, rather than ancestral, use is required.

Both the House and Senate Reports are clear that sections 2 and 3 were "enacting into law the substance of the Department's present regulations on the subject" of allotments. House Report at 4; Senate Report at 4, *reprinted in* 1956 U.S. Code & Ad. News at 4204. We therefore look to the Department of the Interior's contemporaneous regulations for the interpretation of "occupancy."

The early regulations of the Department of the Interior relating to allotments within national forests required that allotments must be "founded on *actual* occupancy prior to the establishment of the forest." 48 L.D. 70, 71 (1921); 50 L.D. 27, 48 (1923); 51 Pub. Lands Dec. 145, 145-46 (1925) (emphasis supplied). In 1935 the Department dropped the word "actual" from its regulations, and from then on utilized the "founded on occupancy" language that was subsequently enacted into the amended Alaska Native Allotment Act. 55 Interior Dec. 282, 283 (1935); 43 C.F.R. § 67.7 (1938-1954); 43 C.F.R. § 67.2 (1958); 43 C.F.R. § 2212.9-2(c) (1965); 43 C.F.R. § 2561.0-8(c) (1977). The regulations contain no explanation of what is meant

by the term "occupancy," nor any indication that the deletion of the word "actual" indicated a change in legal rights.

The administrative practice with regard to these regulations at the time of the 1956 amendments gives little aid in determining the meaning of the term "occupancy." There has been minimal implementation of the Native Allotment program. *United States v. Atlantic Richfield Co.*, 435 F.Supp. 1009, 1015 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir.), *cert. denied*, 449 U.S. 888 (1980); S. Rep. No. 405, 92d Cong., 1st Sess. at 91 (1971). As of the time of congressional consideration of the 1956 amendments, a total of 79 allotments had been made pursuant to the 1906 Act. House Report at 3. There are very few reported decisions of the Department of the Interior regarding these allotments. The earlier published decisions do not address the issue in this case, as they involved natives whose personal use of the land predated the establishment of the national forest (the national forest having been recently established). *Yakutat & Southern Railway v. Setuck Harry, Heir of Setuck Jim*, 48 L.D. 362 (1921); *Frank St. Clair*, 52 L.D. 597 (1929).

In several unpublished decisions in the 1950's the Bureau of Land Management permitted allotments on the basis of ancestral rather than personal occupancy. *Jack Gamble*, Anchorage 017456 (August 10, 1951) (decision by Director of BLM); *Charles G. Benson*, Juneau 011549 (August 24, 1961); *John Littlefield*, Anchorage 133471 (April 28, 1961). However, these decisions were unpublished and of little precedential value.

Since the 1956 amendments the only published I.B.L.A. decisions regarding allotments, involving about 200 consolidated cases in the 70's, held that personal occupancy was required by the Allotment Act. *Louis P. Simpson*, 20 I.B.L.A. 387 (June 16, 1975), petition for reconsideration denied, 41 I.B.L.A. 229 (Oct. 30, 1975); Mary Y. Paul, 21 I.B.L.A. 223 (July 31, 1975); *Christine Laverne Hanlon*, 23 I.B.L.A. 36 (December 2, 1975); *Estate of Benjamin Wright*, 23 I.B.L.A. 120 (December 23, 1975); *Nadja Davis Gamble*, 23 I.B.L.A.

128 (December 23, 1975); *Albert Shields, Sr.*, 23 I.B.L.A. 188 (January 5, 1976); and *Arthur R. Martin*, 41 I.B.L.A. 224 (June 27, 1979). The Board dismissed the 1950's decisions of *Gamble*, *Benson*, and *Littlefield* as possibly erroneous and nonprecedential. *Louis P. Simpson, supra*, 41 I.B.L.A. 229 (petition for reconsideration).

Appellants argue that they should prevail because ambiguous language should be construed in favor of the natives. When unresolved ambiguity exists, this court has applied that familiar canon of statutory construction. *E.g., Escondido Mutual Water Co. v. F.E.R.C.*, 692 F.2d 1223, 1236-37 (9th Cir. 1982); *Rehner v. Rice*, 678 F.2d 1340, 1348 (9th Cir.), *cert. granted*, 51 U.S.L.W. 3339 (Nov. 1, 1982). Nonetheless, we agree with the district court that the canon is but a guideline and not a substantive law. *Shields*, 504 F.Supp. at 1219, n.25. The canon of construction cannot be used by the courts to accomplish what Congress did not intend. *Andrus v. Glover Construction Co.*, 446 U.S. 608, 619 (1980). Nor can the canon be used to judicially legislate. *Blackfeet Tribe of Indians v. Groff*, _____F.2d _____, No. 81-3041, slip op. at 5838 (9th Cir. Dec. 14, 1982).

Here, the language of the statute is not conclusive. Nevertheless, the legislative and administrative history is sufficient for us to construe the intent of Congress. Further, it is appropriate to give great weight to the construction given to a statute by the agency charged with its administration. *Udall v. Tallman*, 380 U.S. 1, 16 (1965). For example, in *Assiniboine & Sioux Tribes v. Nordwick*, 378 F.2d 426 (9th Cir. 1967), *cert. denied*, 389 U.S. 1046 (1968), we were presented with an ambiguous statute with no enlightening legislative history. We declined to apply the canon of liberal construction because we found sufficient administrative practice to warrant judicial deference. *Assiniboine*, 378 F.2d at 432.

CONCLUSION

After reviewing the legislative and administrative history, we conclude that Congress intended to limit allotments on national forest lands to those individuals whose personal occupancy antedated the withdrawal of the land for the national forest. Accordingly, the decision of the district court is AFFIRMED.

TEXT OF ALASKA NATIVE ALLOTMENT ACT
(May 17, 1906)

34 Stat. 197 as amended August 2, 1956, 70 Stat. 954; former 43 U.S.C. §§ 270-1 to 270-3. Repealed but with a savings clause for applications pending on December 18, 1971 by Pub. L. 92-203, 85 Stat. 70, 43 U.S.C. § 1617.

Sec. 1 - The Secretary of the Interior is hereby authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed 160 acres of vacant, unappropriated, and unreserved non-mineral land in the district of Alaska or subject to the provisions of the Act of March 8, 1922 (42 Stat. 415, 48 U.S.C. §§ 376 to 377), vacant, unappropriated and unreserved land in Alaska that may be valuable for coal, oil, or gas deposits to any Indian, Aleut or Eskimo of full or mixed blood who resides in and is a native of said district, and who is the head of a family, or who is 21 years of age; and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity, and shall be inalienable and nontaxable until otherwise provided by Congress provided, that any Indian, Aleut or Eskimo who receives an allotment under this Act, or his heirs, is authorized to convey by deed, with the approval of the Secretary of the Interior, the title to the land so allotted, and such conveyance shall vest in the purchaser a complete title to the land which shall be subject to restrictions against alienation and taxation only if the purchaser is an Indian, Aleut, or Eskimo native of Alaska who the Secretary determines is unable to manage the land without the protection of the United States and the conveyance provides for a continuance of such restrictions. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the non-mineral land occupied by him not exceeding 160 acres.

Sec. 2 - Allotments in national forests may be made under this Act if founded on occupancy of the land prior to the establishment of the particular forest or if the Secretary of Agriculture certifies that the land in an application for an allotment is chiefly valuable for agricultural or grazing purposes.

Sec. 3 - No allotment shall be made to any person under this Act until said person has made proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of five years.

No. 82-1807

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALBERT SHIELDS, JR., HEIR OF ALBERT SHIELDS, SR., et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

SUPPLEMENTAL APPENDIX

CRAIG J. TILLERY
615 H Street, Suite 100
Anchorage, Alaska 99501
(907) 272-9431

Counsel for Petitioners

May 16, 1983

TABLE OF CONTENTS

No. 82-1807

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALBERT SHIELDS, JR., HEIR OF
ALBERT SHIELDS, SR., et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,
et al.,

Respondents.

SUPPLEMENTAL APPENDIX

CRAIG J. TILLERY
615 H Street, Suite 100
Anchorage, Alaska 99501
(907) 272-9431

Counsel for Petitioners

May 16, 1983

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS

ALBERT SHIELDS, SR.

IBLA 76-42 Decided January 5, 1976

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting application for allotment pursuant to the Alaska Native Allotment Act, AA 7736.

Affirmed.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Albert Shields, Sr., appeals from the June 4, 1975, decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting his application for an allotment pursuant to the Alaska Native Allotment Act, 34 Stat. 197, *as amended*, 43 U.S.C. §§ 270-1 to 270-3 (1970), repealed by § 18 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (Supp. III, 1973).

There is no doubt that appellant has occupied the land for the requisite period of time. Two employees of the BLM stated after a field report that the appellant described his use of the tract and the physical layout of the tract in precise detail. They further stated:

> I examined this case and believe the applicant has used the subject land and if any native of Alaska deserves an allotment, Albert Shields, Sr. *does*. [Emphasis in original.]

Therefore, there is no doubt that appellant's bona fides are beyond question.

Unfortunately, the law was so framed that appellant's use does not qualify him for an allotment. The pertinent statute provided:

> Allotments in national forests may be made under sections 270-1 to 270-3 of this title if founded on occupancy of the land prior to the establishment of the particular forest or if the Secretary of Agriculture certifies that the land in an application for an allotment is chiefly valuable for agricultural or grazing purposes. (May 17, 1906, ch. 2469, § 2, as added Aug. 2, 1956, ch. 891, § 1(e), 70 Stat. 954[,43 U.S.C. § 270-2 (1973)].)

The land on which appellant's allotment is located lies within the Tongass National Forest which was created in 1909 several years before appellant's birth. Furthermore, a letter from the Regional Forester, dated July 10, 1974, indicates that the land is *not* chiefly valuable for agricultural or grazing purposes. In such cases the land is not subject to allotment. 43 CFR 2561.0-8(c).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Frederick Fishman
Administrative Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

ALBERT SHIELDS, JR., Heir of Albert Shields, Sr.,	)	
Plaintiffs,	)	No. A 77-66 Civil
v.	)	
	)	OPINION
UNITED STATES OF AMERICA, et al.,	)	(Filed Jan. 9, 1981)
Defendants.	)	

This case presents a single issue. Must Alaskan Natives applying for allotments within a national forest under the 1906 Alaska Native Allotment Act establish personal use and occupancy of the land prior to establishment of the forest?[1] Resolution of the issue turns on the construction given section 2 of the 1956 Amendments to the Native Allotment Act.[2]

> Sec. 2. Allotments in national forests may be made under this Act if founded on occupancy of the land prior to the establishment of the particular forest or if the Secretary of Agriculture certifies that the land in an application for an allotment is chiefly valuable for agricultural or grazing purposes.

[1] This court has jurisdiction under 28 U.S.C. § 1353 (1976) and 25 U.S.C. § 345 (1963). Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976). This case is before this court on review of a final decision by the Interior Board of Land Appeals denying Albert Shields, Sr.'s application for allotment.

[2] Act of May 17, 1906, 34 Stat. 197, as amended, Act of August 6, 1956, 70 Stat. 954; repealed by the Alaska Native Claims Settlement Act, § 18, with a savings clause for applications pending on December 18, 1971, 43 U.S.C. § 1617(a) (1980).

The precise question is what the Congress meant by "founded on occupancy of the land prior to the establishment of the particular forest. . ." The plaintiff claims that the applicant must demonstrate that Native occupancy was established prior to the applicable withdrawal for the forest. The defendants contend that the applicant must personally have occupied the land prior to the withdrawal.

Plaintiffs consist of a class of Alaska Natives who have applied for allotments under the 1906 Alaska Native Allotment Act. The land they seek is located within a national forest and was occupied by Alaska Natives prior to the forest withdrawal, but plaintiffs are unable to establish their personal use of it before its withdrawal.

THE 1906 ACT

The Treaty of Cession[3] in which the United States obtained Alaska by purchase from Russia in 1867 did not address the property rights of the Native inhabitants. It provided only that the Natives would be subject to such laws as the United States might adopt with respect to the aboriginal tribes.[4] The Organic Act of 1884[5] contained the first mention of the property rights of Alaskan Natives. Section 8 provided:

> . . . that the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress . . .

---

[3] Treaties of March 6, 1867, 15 Stat. 539.

[4] United States v. ARCO, 435 F. Supp. 1009 (D. Alaska 1978), *aff'd* 612 F.2d 1132 (9th Cir. 1980), *cert. denied* ____U.S.____ (1980).

[5] Act of May 17, 1884, 23 Stat. 24.

In 1887 Congress enacted the General Allotment Act[6] which provided:

> Where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, Act of Congress, or Executive Order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children . . . .

Since in several decisions Alaskan Natives had been found not to be within the definition of "Indian", there was doubt whether the General Allotment Act applied to Alaska Natives. Congress moved in 1906 to eliminate this doubt[7] by passing the Alaska Native Allotment Act, which provided in part:[8]

> That the Secretary of the Interior is hereby authorized and empowered in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of nonmineral land in the district of Alaska to any Indian or Eskimo of full or mixed blood who resides in and is a native of said district, and who is the head of a family or is twenty-one years of age: and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity, and shall be inalienable and nontaxable until otherwise provided by Congress. Any person qualified for an allotment as aforesaid shall have

---

[6] 25 U.S.C. § 334.

[7] Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976).

[8] Act of May 17, 1906, 34 Stat. 197, as amended, Act of August 6, 1956, 70 Stat. 954; repealed by the Alaska Native Claims Settlement Act, § 18, with a savings clause for applications pending on December 18, 1971, 43 U.S.C. § 1617(a) (1980).

> the preference right to secure by allotment the non-mineral land occupied by him not exceeding one hundred and sixty acres.

In 1910 Congress amended the General Allotment Act[9] to allow for allotments in the national forests:

> The Secretary of the Interior is authorized, in his discretion, to make allotments within the national forests in conformity with the general allotment laws, to any Indian occupying, living on, or having improvements on land included within any such national forest who is not entitled to an allotment on any existing Indian reservation, or for whose tribe no reservation has been provided, or whose reservation was not sufficient to afford an allotment to each member thereof. All applications for allotments under the provisions of this section shall be submitted to the Secretary of Agriculture who shall determine whether the lands applied for are more valuable for agricultural or grazing purposes than for the timber found thereon; and if it be found that the lands applied for are more valuable for agricultural or grazing purposes, then the Secretary of the Interior shall cause allotment to be made as herein provided.

No such amendment was made to the Alaska Native Allotment Act despite the fact that some sixteen million acres of Native lands were set aside by presidential proclamations in 1902, 1907 and 1909 to create what is now the Tongass National Forest.[10] Additional land was set aside by presidential proclamation for the Chugach National Forest commencing in 1907.[11]

---

[9] 25 U.S.C. § 337.

[10] *See* Tlingit and Haida Indians of Alaska v. United States, 177 F. Supp. 452, 466-67 (Ct. of Cl. 1959).

[11] Presidential Proclamation of July 23, 1907.

The early decisions of the Department of the Interior relating to allotments within national forests required "actual" occupancy prior to the establishment of the national forest.[12] However, this requirement was dropped in 1935[13] in favor of the "founded on occupancy" language at issue in this lawsuit. The earliest published regulations of the Department of the Interior incorporated this language as well as a provision of the 1910 General Allotment Act making land included within a national forest available for allotment if it was chiefly valuable for agriculture or grazing and personally occupied by the applicant.[14]

The Allotment Act, as adopted in 1906, provided that allotments were inalienable unless otherwise provided by Congress. The 1956 Amendments to the Act were designed to rectify this situation.[15] As originally introduced, the bill addressed only the alienation issue.[16]

Apparently some concern was expressed in the House Subcommittee that Alaska Natives might seek allotments in the national forests solely for the purpose of selling the land to others. To eliminate this danger the substance of the Interior Department's regulations on the subject were enacted into the bill. A report from the Department of the Interior concerning this legislation[17] stated:

> Subsection (e) of the enclosed substitute bill [Sections 2 and 3 of the Act] contains the subcommittee recommendations that are designed to safeguard the national forests. Some fear was expressed during the subcommittee hearings that the authority to sell

---

[12] 48 L.D. 70, 71 (1921); 50 L.D. 27, 48 (1923); 51 L.D. 145, 146 (1925).

[13] 55 L.D. 282, 283.

[14] 43 C.F.R. 67.7 (1940).

[15] H.R. Rep. No. 2534, 84th Cong., 2d Sess. (1956).

[16] H.R. 10505, 84th Cong., 2d Sess. (1956).

[17] H.R. Rep. No. 2534, 84th Cong., 2d Sess. 4 (1956).

> homesteads might encourage Indians and Eskimos to seek homestead allotments in the national forests for the purpose of selling them to others. This danger is effectively obviated by enacting into law the substance of the Department's present regulations on the subject, which prohibit homestead selections in the national forests unless they are founded upon occupancy of the land prior to the establishment of the forest, or unless the land selected is determined by the Secretary of Agriculture to be chiefly valuable for agricultural or grazing purposes, and which require the homesteader to prove 5 years' occupancy of the land.

The House Report[18] echoed the Department's analysis:

> Subsection (e) safeguards the national forests by enacting into law the substance of present regulations which prohibit homestead selections in the national forests unless they are founded upon occupancy of the land prior to the establishment of the forest, or unless the land selected is determined by the Secretary of Agriculture to be chiefly valuable for agricultural or grazing purposes, and which require the homesteader to prove 5 years' occupancy of the land.

The Senate Report[19] was even more explicit on the occupancy requirement:

> Allotments may be made in the national forests if the land is chiefly valuable for agricultural or grazing purposes, or if the native had occupied the land prior to the establishment of the forest.

---

[18] *Id.* at 2.

[19] S. Rep. No. 2696, 84th Cong., 2d Sess. 1 (1956).

Early administration practice,[20] while sparse,[21] appears to have required individual occupancy of the land prior to the forest withdrawal. Although there were some exceptions to this practice,[22] since the 1956 Amendments, the Department has consistently required individuals seeking allotments to establish their own use and occupancy of the land prior to the establishment of the particular forest withdrawal.[23]

It is obvious that when Congress amended the 1906 Act it gave great weight to the Interior Department's interpretation and practices regarding the statutory language at issue. Such circumstances are persuasive evidence that the interpretation urged by the agency is the one intended by Congress.[24] This principle is especially true when, as here, there are long-standing administrative decisions interpreting the availability of land for Native selection, acceptance of that

---

[20] *See e.g.* Yakutat and Southern Railway v. Setuck Harry, Heir of Setuck Jim, 48 L.D. 362, 364 (1921); Frank St. Clair, 52 L.D. 597, 598 (1929).

[21] Although the Native Allotment Act dates back to 1906, few certificates of allotment were granted under the Act for the first 50 years. As of November 8, 1955, a total of 79 allotments had been made pursuant to the Act, and 64 additional applications were under consideration. S. Rep. No. 2696, 84th Cong., 2d Sess. (1956).

[22] See exhibits 25-27 to Plaintiffs' Motion for Summary Judgment.

[23] *See e.g.* Louis P. Simpson, 20 IBLA 387 (1975); Mary Y., 21 IBLA 223 (1975); Christina Laverne Hanlon, 23 IBLA 36 (1975); Estate of Benjamin Wright, 23 IBLA 120 (1975); Nadia Davis Gamble, 23 IBLA 128 (1975); Arthur R. Martin, 41 IBLA 224 (1977). On petition for rehearing in the *Simpson* case the IBLA indicated that those earlier decisions (see note 22) which did not require proof of personal occupancy prior to the withdrawal were erroneous. 41 IBLA 229-30 (1979).

[24] Udall v. Tallman, 380 U.S. 1, 16-18 (1965); Russ v. Wilkens, 624 F.2d 914, 922-24 (9th Cir. 1980).

interpretation by Congress, and enactment of legislation prepared by the agency charged with administration of the Act.[25]

Based on the administrative and legislative history, I conclude that Congress was primarily concerned with allowing for alienation of allotments when it amended the Alaska Native Allotment Act in 1956. Due to its concern that such legislation might encourage the selection and sale of such allotments within national forests, Congress enacted into law the substance of then existing regulations on the subject. I conclude that the intent of Congress in this regard was to restrict allotments within national forests[26] by prohibiting them except to those individuals who could demonstrate personal occupancy of the land prior to the establishment of the forest or unless the land selected is chiefly valuable for agricultural or grazing purposes. I find, therefore, that the language "founded upon occupancy of the land prior to the establishment of the particular forest" requires Alaska Natives who seek allotments within a national forest to demonstrate their personal use and occupancy of that land prior to the establishment of the forest.

---

[25] Plaintiffs argue vigorously that the principle of statutory construction requiring ambiguities and doubtful expressions in statutes passed for the benefit of Indians to be resolved in favor of Indians dictates a ruling in their favor. This canon, however, is only a guideline, not a substantive law and should not be used to defeat the manifest intent of Congress. U.S. v. Atlantic Richfield Co., 612 F.2d 1132 (9th Cir. 1980), *cert. denied* ____U.S.____ (1980).

[26] Plaintiffs have strongly argued that Congress could not have intended to require personal use and occupancy of the land prior to the forest withdrawal since the withdrawals occurred in the early 1900's and few Native Alaskans, if any, would have been eligible for allotments when the Act was amended in 1956. This argument assumes, however, that the purpose of the amendments was to assure the right to allotments in the national forests. On the contrary, the purpose of the amendments appears to have been the safeguarding of the national forests from allotments sought only for sale.

Plaintiffs' Motion for Summary Judgment is, therefore, DENIED. Defendants' Cross Motion for Summary Judgment is GRANTED and the case is DISMISSED.

DATED at Anchorage, Alaska, this 9th day of January, 1981.

JAMES M. FITZGERALD
United States District Judge

United States District Court

FOR THE

DISTRICT OF ALASKA

ALBERT SHIELDS, SR., on behalf of himself and all others similarly situated,	)	Civil Action File No. A77-66 CIV
vs.	)	JUDGMENT
UNITED STATES OF AMERICA, CECIL D. ANDRUS, in his capacity as Secretary of the United States Department of the Interior, and ROBERT S. BERGLAND, in his capacity as Secretary of the United States Department of Agriculture.	)	(Filed Jan. 28, 1981)

This action came on for (hearing) before the Court, Honorable James M. Fitzgerald, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged:

Plaintiffs' Motion for Summary Judgment is DENIED. Defendants' Cross Motion for Summary Judgment is GRANTED and the case is DISMISSED.

Dated at Anchorage, Alaska, this 28th day of January, 1981.

JAMES M. FITZGERALD
U.S. District Court Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALBERT SHIELDS, JR., Heir of Albert Shields, Sr., et al.,	)	No. 81-3120
	)	DC No. A 77-66 CIV
Appellants,	)	
vs.	)	
	)	MEMORANDUM
UNITED STATES OF AMERICA, et al.,	)	(Filed Nov. 10, 1982)
Appellees.	)	

Appeal from the United States District Court
for the District of Alaska
James M. Fitzgerald, District Judge, Presiding

Argued and submitted June 8, 1982

Before: WRIGHT, SKOPIL, and ALARCON, Circuit Judges

Appellant class, approximately 200 applicants for allotments under the 1906 Alaska Native Allotment Act, appeal a district court decision holding that the Allotment Act requires the applicant to establish personal, rather than ancestral, use and occupancy of the land prior to its withdrawal for national forests. We affirm.

I.

In 1906 Congress passed the Alaska Native Allotment Act, Pub. L. No. 171, 34 Stat. 197 (amended 1956, repealed 1971), which authorized the Secretary of the Interior to grant Alaska

Natives allotments of up to 160 acres. In 1956 Congress amended the Allotment Act. Act of Aug. 2, 1956, Pub. L. No. 931, 70 Stat. 954 (codified at 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed 1971))("Allotment Act").[1] The text of the 1906 Allotment Act became section 1, and was amended to allow alienation. Section 2 provided that allotments in national forests could be made

> "if founded on occupancy of the land prior to the establishment of the particular forest or if the Secretary of Agriculture certifies that the land in an application for an allotment is chiefly valuable for agricultural or grazing purposes."

Section 3 provided that no allotment (whether in or outside a national forest) could be made except on proof of five years "substantially continuous use and occupancy" by the applicant.

On December 13, 1971 Albert Shields, Sr. filed an application for an allotment of 160 acres of land presently within the Tongass National Forest. The land for which he applied had been withdrawn for national forest use by presidential proclamation on February 16, 1909. Mr. Shields alleged that his grandfather had lived on this land beginning in the 1850's. Mr. Shields was born in 1915, and his use of the land began in 1920. The BLM rejected Mr. Shields' application for allotment because he had failed to demonstrate either personal use prior to the withdrawal or that the land was chiefly valuable for agricultural or grazing. The Interior Board of Land Appeals ("IBLA") rejected Mr. Shields' appeal for the same reasons. 23 IBLA 188 (January 5, 1976).

Mr. Shields filed this action in district court in the District of Columbia on February 23, 1977 to review the IBLA denial of the application for allotment. The case was transferred to

---

[1] The Allotment Act was repealed by section 18 of the Alaska Native Claim Settlement Act ("ANCSA"), 43 U.S.C. § 1617, with a savings clause for applications pending on December 18, 1971. 43 U.S.C. § 1617(a).

the District of Alaska on motion of the United States. The plaintiff, Albert Shields, Sr., died on November 13, 1977 and Albert Shields, Jr. was substituted as plaintiff.

The district court certified a plaintiff class of all Alaska Natives who had made timely application for allotments under the Alaska Native Allotment Act for land located within a national forest whose applications had been denied on the grounds that they cannot establish personal occupancy of that land prior to the forest withdrawal. Both sides filed cross-motions for summary judgment.

On January 9, 1981 the district court granted the government's motion for summary judgment and held that Alaska Natives applying for allotments within a national forest under the 1906 Alaska Native Allotment Act must establish personal, rather than ancestral, use and occupancy of the land prior to establishment of the national forest.

II.

The sole issue before us is whether Alaska Natives applying for allotments within a national forest under the Alaska Native Allotment Act must establish personal, rather than ancestral, use and occupancy of the land prior to establishment of the national forest.

III.

Section 2 of the Alaska Native Allotment Act, as amended in 1956, provides:

> "Sec. 2. Allotments in national forests may be made under this Act if *founded on occupancy of the land prior to the establishment of the particular forest* or if the Secretary of Agriculture certifies that the land in an application for an allotment is chiefly valuable for agricultural or grazing purposes."

43 U.S.C. § 270-2 (1970) (repealed 1971) (emphasis added). The government contends the statute requires that the applicant must personally have occupied the land prior to the withdrawal; appellant claims that occupancy by a direct ancestor is sufficient.

In interpreting statutes the court's objective is to ascertain the intent of Congress. *Philbrook v. Glodgett,* 421 U.S. 707 (1975). The primary rule of statutory construction is to ascertain and give effect to the plain meaning of the language used. *Hughes Air Corp. v. Public Utilities Comm.,* 644 F.2d 1334 (9th Cir. 1981). The language of the statute, however, does not aid our search for congressional intent, in that the statute itself is ambiguous regarding whether personal or ancestral occupancy is required.

Appellants argue that unless section 2 is read to require only ancestral occupancy, the additional requirement of five years use and occupancy in section 3 would be rendered meaningless, in violation of the rule of statutory construction that one provision should not be interpreted in a way which is internally contradictory or that renders other provisions of the same statute inconsistent or meaningless. *Hughes Air Corp., supra,* at 1337; *Jacobson v. Rose,* 592 F.2d 515 (9th Cir. 1978), *cert. denied,* 442 U.S. 930 (1979); *Patagonia Corp. v. Board of Governors of Federal Reserve System,* 517 F.2d 803 (9th Cir. 1975). This argument is meritless. The section 3 five year occupancy requirement applies to allotments under both sections 1 and 2. Section 1 authorizes allotments from any public lands in Alaska, while section 2 authorizes allotments under specific conditions from national forest lands. Thus, the personal occupancy requirement of section 3 has meaning as applied to section 1 allotments, regardless of the interpretation of section 2.

Because the language of the statute does not reveal congressional intent, we must look to the legislative history. *Heppner v. Alyeska Pipeline Service Co.,* 665 F.2d 868 (9th Cir.

1981). The 1956 amendments to the 1906 Alaska Native Allotment Act began as a House bill, HR 11696. The House Report states that sections 2 and 3 "[safeguard] the national forests by enacting into law the substance of present regulations which prohibit homestead selections in the national forests unless they are founded upon occupancy of the land prior to the establishment of the forest . . . ." H.R. Rep. No. 2534, 84th Cong., 2d Sess. 2 (1956) [hereinafter cited as House Report].

The Senate Report, though, clearly states that "[a]llotments may be made in the national forests...*if the native had occupied* the land prior to the establishment of the forest." S. Rep. No. 2696, 84th Cong., 2d Sess. 1, *reprinted at* 1956 U.S. Code Cong. & Ad. News 4201, 4202 (emphasis added). This sentence suggests that personal, rather than ancestral, use is required.

Both the House and Senate Reports clearly state that sections 2 and 3 were "enacting into law the substance of the Department's present regulations on the subject" of allotments. House Report at 4; Senate Report at 4, *reprinted in* 1956 U.S. Code & Ad. News at 4204. We therefore look to the Department of the Interior's contemporaneous regulations for the interpretation of "occupancy."

The early regulations of the Department of the Interior relating to allotments within national forests required that allotments must be "founded on *actual* occupancy prior to the establishment of the forest." 48 L.D. 70, 71 (1921); 50 L.D. 27, 48 (1923); 51 Pub. Lands Dec. 145, 145-46 (1925) (emphasis supplied). In 1935 the Department dropped the word "actual" from its regulations, and from then on utilized the "founded on occupancy" language that was subsequently enacted into the amended Alaska Native Allotment Act. 55 Interior Dec. 282, 283 (1935); 43 C.F.R. § 67.7 (1938-1954); 43 C.F.R. § 67.2 (1958); 43 C.F.R. § 2212.9-2(c) (1965); 43 C.F.R. § 2561.0-8(c) (1977). The regulations contain no explanation of what is meant by the term "occupancy," nor any indication that the deletion of the word "actual" indicated a change in legal rights.

The administrative practice with regard to these regulations at the time of the 1956 amendments gives little aid in determining the meaning of the term "occupancy." There has been minimal implementation of the Native Allotment program. *United States v. Atlantic Richfield Co.*, 435 F.Supp. 1009, 1015 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir.), *cert. denied*, 449 U.S. 888 (1980); S. Rep. No. 405, 92d Cong., 1st Sess. at 91 (1971). As of the time of congressional consideration of the 1956 amendments, a total of 79 allotments had been made pursuant to the 1906 Act. House Report at 3. There are very few reported decisions of the Department of the Interior regarding these allotments. The earlier published decisions do not address the issue in this case, as they involved natives whose personal use of the land predated the establishment of the national forest (the national forest having been recently established). *Yakutat & Southern Railway v. Setuck Harry, Heir of Setuck Jim*, 48 L.D. 362 (1921); *Frank St. Clair*, 52 L.D. 597 (1929).

In several unpublished decisions in the 1950's the Bureau of Land Management permitted allotments on the basis of ancestral rather than personal occupancy. *Jack Gamble*, Anchorage 017456 (August 10, 1951) (decision by Director of BLM); *Charles G. Benson*, Juneau 011549 (August 24, 1961); *John Littlefield*, Anchorage 133471 (April 28, 1961). However, these decisions were unpublished and of little precedential value.

Since the 1956 amendments the only published I.B.L.A. decisions regarding allotments, involving about 200 consolidated cases in the 70's, held that personal occupancy was required by the Allotment Act. *Louis P. Simpson*, 20 I.B.L.A. 387 (June 16, 1975), petition for reconsideration denied, 41 I.B.L.A. 229 (Oct. 30, 1975); *Mary Y. Paul*, 21 I.B.L.A. 223 (July 31, 1975); *Christina Laverne Hanlon*, 23 I.B.L.A. 36 (December 2, 1975); *Estate of Benjamin Wright*, 23 I.B.L.A. 120 (December 23, 1975); *Nadja Davis Gamble*, 23 I.B.L.A. 128 (December 23, 1975); *Albert Shields, Sr.*, 23 I.B.L.A. 188 (January 5,1976); and *Arthur R. Martin*, 41 I.B.L.A. 224 (June

27, 1979). The Board dismissed the 1950's decisions of *Gamble, Benson,* and *Littlefield* as possibly erroneous and nonprecedential. *Louis P. Simpson, supra,* 41 I.B.L.A. 229 (petition for reconsideration).

CONCLUSION

After reviewing the legislative and administrative history, we conclude that Congress intended to limit allotments on national forest lands to those individuals whose personal occupancy antedated the withdrawal of the land for the national forest. Accordingly, the decision of the district court is AFFIRMED.

No. 82-1807

In the Supreme Court of the United States

OCTOBER TERM, 1983

ALBERT SHIELDS, JR., HEIR OF
ALBERT SHIELDS, SR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

F. HENRY HABICHT, II
Acting Assistant Attorney General

JACQUES B. GELIN
MARTIN W. MATZEN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether allotments of national forest land under the Alaska Native Allotment Act, as amended, may be made to applicants who did not personally use or occupy the land prior to the establishment of the particular national forest.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Statutes and regulation:

Page

Statutes and regulation—Continued:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1807

ALBERT SHIELDS, JR., HEIR OF
ALBERT SHIELDS, SR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-9a) is reported at 698 F.2d 987. The opinion of the district court (Supp. App. 4-12) is reported at 504 F. Supp. 1216. The opinion of the Interior Board of Land Appeals denying the allotment application of petitioner Shields, the class representative (Supp. App. 2-3), is reported at 23 I.B.L.A. 188.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1982. A petition for rehearing was denied on February 7, 1983, and an amended opinion was substituted on that date (Pet. App. 1a). The petition for a writ of certiorari was filed on May 4, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Alaska Native Allotment Act, Act of May 17, 1906, ch. 2469, 34 Stat. 197, as amended by the Act of Aug. 2, 1956, Pub. L. No. 931, 70 Stat. 954, 43 U.S.C. (1970 ed.) 270-1 *et seq.* (repealed 1971) (43 U.S.C. 1617), is set forth at Pet. App. 10a-11a.

STATEMENT

Petitioners are a certified class of Alaska Natives who filed applications for allotments of land located within national forests in Alaska under the Alaska Native Allotment Act, Act of May 17, 1906, ch. 2469, 34 Stat. 197, as amended by the Act of Aug. 2, 1956, Pub. L. No. 931, 70 Stat. 954, 43 U.S.C. (1970 ed.) 270-1 *et seq.* ("Allotment Act"), prior to its repeal in 1971.[1] Section 2 of the Allotment Act, 43 U.S.C. (1970 ed.) 270-2 (emphasis added), permitted such allotments only

> *if founded on occupancy of the land prior to the establishment of the particular forest* or if the Secretary of Agriculture certifies that the land in an application for an allotment is chiefly valuable for agricultural or grazing purposes.

The Secretary of the Interior denied petitioners' allotment applications because petitioners could not "establish personal occupancy of [the] land prior to the forest withdrawal." Pet. App. 4a.

Petitioner Shields,[2] as named representative, brought this class action claiming that the statutory requirement that the allotment be "founded on occupancy of the land

---

[1]The Allotment Act was repealed by Section 18 of the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. 1617. A savings clause preserved applications that were pending on December 18, 1971. *Ibid.*

[2]The original plaintiff, Albert Shields, Sr., died on November 13, 1977, and petitioner Albert Shields, Jr. was substituted as plaintiff. Pet. App. 3a-4a.

prior to the establishment of the particular forest" was satisfied by a showing of Native occupancy prior to the establishment of the forest.[3] The district court rejected this contention. Rather, based on "the administrative and legislative history" (Supp. App. 11), it concluded (*ibid.*)

> that the language "founded upon occupancy of the land prior to the establishment of the particular forest" requires Alaska Natives who seek allotments within a national forest to demonstrate their personal use and occupancy of that land prior to the establishment of the forest.

Accordingly, in view of the undisputed facts (see Pet. 3) that the land for which petitioner Shields had applied had been withdrawn for the Tongass National Forest in 1909 and that Shields' personal use of it had not commenced until 1920, the district court entered summary judgment in favor of respondents (Supp. App. 4-12). The court of appeals affirmed (Pet. App. 2a-9a).

ARGUMENT

The repeal of the Allotment Act in 1971, together with its replacement by comprehensive legislation of substantial benefit to Alaska Natives, has reduced considerably the significance of the question presented by the petition.[4] In

---

[3]Petitioners are not contending that they are entitled to the land in question on the alternative ground that it "is chiefly valuable for agricultural or grazing purposes." 43 U.S.C. (1970 ed.) 270-2.

[4]As noted above (note 1, *supra*), Section 18 of ANCSA, 43 U.S.C. 1617, repealed the Allotment Act while preserving allotment applications that were pending on December 18, 1971. Thereafter, the Alaska National Interest Lands Conservation Act ("ANILCA"), 43 U.S.C. (Supp. V) 1634(a)(1), approved the bulk of the "over 7,400" allotment claims that were pending on December 18, 1971. S. Rep. No. 96-413, 96th Cong., 1st Sess. 237 (1979). Although the allotment claims involved in this case are among the limited class of claims that were not legislatively approved by ANILCA (see 43 U.S.C. (Supp. V) 1634(c)),

any event, the decision below is correct and does not conflict with any decision of this Court or any other court of appeals. Further review therefore is not warranted.

---

the approximately 200 petitioners in this case constitute the entire class of applicants for allotments of forest lands whose applications were pending on December 18, 1971, and denied because of a failure to establish personal occupancy prior to withdrawal of the forest lands at issue.

Cognizant of the relatively limited direct impact of the decision below (Pet. 14), petitioners attempt to bolster its significance by suggesting (*ibid.*) that the holding may be found persuasive in "a broad range of Native allotment cases in Alaska." Petitioners' concern, however, is entirely speculative. The Natives in *Akootchook* v. *Watt*, No. F-82-4 (D. Alaska filed Jan. 15, 1982), on which petitioners rely (Pet. 14), dispute the government's contention that the prior personal—rather than ancestral—occupancy the courts below held was necessary for an allotment under Section 2 also is required of an applicant for land within a national wildlife refuge under Section 1 (43 U.S.C. (1970 ed.) 270-1), the provision of the Allotment Act involved in that case. See Plaintiffs' Reply to Defendants' Opposition to Motion for Summary Judgment and Plaintiffs' Opposition to Defendants' Cross Motion for Summary Judgment at 3-5 (counsel for petitioners in this case also represents the plaintiff Natives in *Akootchook* v. *Watt*). In any event, since Section 1 of the Allotment Act also was repealed in 1971, even assuming the decision below would control *Akootchook*, only a limited number of additional applicants would be even indirectly affected by it.

Moreover, as noted below (note 6, *infra*), ANCSA represents a comprehensive settlement of claims of Alaska Natives based on aboriginal title. In view of the many substantial benefits Congress conferred in exchange for ANCSA's extinguishment of those claims, petitioners' suggestion (Pet. 14 n.11) that the allotments they seek here "may well represent all that they have in life" surely overstates the significance of this case even to that limited number of allotment applicants who may be affected by it. In the first place, petitioners are seeking the allotments at issue for "seasonal subsistence purposes," not for primary residential use (Record on Appeal, CR 27, Exh. 7; see also Pet. 3). ANCSA's repeal left petitioners with the option of pursuing their allotment claims or seeking patents for up to "160 acres of land occupied by the Native as a primary place of residence on August 31, 1971." 43 U.S.C. (Supp. V) 1613(h)(5) and 43 U.S.C. 1617(a); see also 43 U.S.C. (Supp. V) 1613(c)(1) (providing for conveyance of surface estate in tracts occupied as a primary place of residence, primary place of business, subsistence

1. As with any case involving the construction of a statute, the objective "is to ascertain the congressional intent and give effect to the legislative will." *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975). Even if, as the court of appeals concluded (Pet. App. 8a), "the language of the [Allotment Act] is not conclusive" concerning whether an allotment applicant must prove personal, rather than ancestral, use and occupancy of the land prior to establishment of the national forest, the legislative history demonstrates unequivocally Congress's intent that only personal use would satisfy the "founded on occupancy" requirement of 43 U.S.C. (1970 ed.) 270-2. The Senate Report that accompanied the 1956 Amendments, by which Sections 2 and 3, 43 U.S.C. (1970 ed.) 270-2 and 270-3, were added to the Allotment Act, stated the requirement of personal occupancy unambiguously (S. Rep. No. 2696, 84th Cong., 2d Sess. 1 (1956) (emphasis added)):

> Allotments may be made in national forests if the land is chiefly valuable for agricultur[al] or grazing purposes, or if *the native* had occupied the land prior to the establishment of the forest.

In any event, we do not agree that the language and structure of the Allotment Act "do[] not aid [the] search for congressional intent" (Pet. App. 5a). It is "fundamental that a section of a statute should not be read in isolation from the context of the whole Act." *Richards* v. *United States*, 369

---

campsite or headquarters for reindeer husbandry). Significantly, Congress recently has sought to protect the seasonal subsistence use of public lands by Alaska Natives through public management of the land, rather than by transferring ownership to individual Alaskans. See Title VIII of ANILCA, 16 U.S.C. (Supp. V) 3111-3126. ANCSA also provides substantial benefits to Alaska Natives through their ownership of stock in the Regional and Village Corporations organized pursuant to the statute. See generally *Doyon, Ltd.* v. *Bristol Bay Native Corp.*, 569 F.2d 491 (9th Cir. 1978); *Okpeagvik Inupiat Corp.* v. *Arctic Slope Regional Corp.*, 517 F. Supp. 1255 (D. Alaska 1981).

U.S. 1, 11 (1962) (footnote omitted). Accordingly, " '[i]n expounding a statute, [this Court is not] guided by a single sentence or member of a sentence, but look[s] to the provisions of the whole law, and to its object and policy.' " *Philbrook* v. *Glodgett, supra*, 421 U.S. at 713, quoting *United States* v. *Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849). When Section 2 of the Allotment Act, 43 U.S.C. (1970 ed.) 270-2, is properly viewed in the context of the Act as a whole, it is clear that its "founded on occupancy" requirement is a requirement of personal, rather than ancestral, use.

Not only Section 2, but each of the three sections of the amended Allotment Act, 43 U.S.C. (1970 ed.) 270-1 to 270-3, contains a requirement based on occupancy (see Pet. App. 10a-11a). Section 1, 43 U.S.C. (1970 ed.) 270-1, which affords a qualified Indian, Aleut or Eskimo a preference right to secure by allotment up to 160 acres of nonmineral land occupied *by him*, on its face requires personal occupancy by the Native applicant, and petitioners have never contended otherwise. Moreover, in the court of appeals petitioners conceded (Brief for Appellant at 9) that the requirement in Section 3, 43 U.S.C. (1970 ed.) 270-3, of proof of "substantially continuous use and occupancy of the land for a period of five years" "plainly stated" a "requirement of personal occupancy."[5] The burden of petitioner's argument is that, in Section 2, notwithstanding the

---

[5]In the court of appeals, petitioners argued that unless Section 2 were construed to require only ancestral occupancy, Section 3's additional requirement of five years' use and occupancy would be rendered superfluous. The court of appeals correctly rejected this argument on the ground that the Section 3 five-year occupancy requirement applies to Section 1, which authorizes allotments from any public lands, as well as to Section 2, which authorizes allotments from national forest lands under certain conditions. Thus, the court of appeals concluded (Pet. App. 5a), "the personal occupancy requirement of [S]ection 3 has

similarity of the language employed therein—"occupancy of the land prior to the establishment of the particular forest"—Congress intended the entirely different concept of "traditional" or "ancestral" occupancy by Alaska natives.[6] But neither the statutory language nor the legislative history of the 1956 Amendments signals any intent by Congress to effect so dramatic a shift in meaning within the context of a single statute.

---

meaning as applied to [S]ection 1 allotments, regardless of the interpretation of [S]ection 2." Similarly, Section 3's five-year occupancy requirement applies to allotments under Section 2 of land that "is chiefly valuable for agricultural or grazing purposes." We add that the combined requirements of Sections 2 and 3 served to assure that forest land allotments were granted only where an Alaska Native's use and occupancy not only antedated the land's inclusion in the national forest, but also continued for at least five years before the allotment was made.

[6]Although petitioners emphasize (Pet. i, 3) Shields' relatively intimate connection to the land in question, both in terms of his own use and his relationship to those who used the land prior to its withdrawal for the Tongass National Forest, petitioners' argument plainly applies as well to persons whose connection with the land they seek is far more attenuated than Shields'. Petitioners thus contend that allotments under Section 2 may be based on "an unbroken chain of *Native* use and occupancy." Pet. 4 (emphasis added); see also id. at 8 ("ancestral[] occupancy"); Brief for Appellant in the court of appeals at 7 ("continuous occupancy by *a* Native or Natives since a time prior to the applicable land withdrawal" (emphasis added)); *id.* at 7-8 ("traditional native occupancy rather than the occupancy of a specific applicant" (footnote omitted)).

In one of the administrative decisions denying the allotment applications of the petitioner class, the occupancy concept urged by petitioners was therefore correctly denominated "aboriginal occupancy." *Louis P. Simpson*, 20 I.B.L.A. 387, 398, 400 (1975) (Thompson, Administrative Judge, concurring). Section 4 of ANCSA, 43 U.S.C. 1603, however, extinguished all claims to land in Alaska based on aboriginal use and occupancy. See *United States* v. *Atlantic Richfield Co.*, 612 F.2d 1132, 1134-1138 (9th Cir.), cert. denied, 449 U.S. 888 (1980). To be sure, ANCSA expressly provided for the preservation of the Allotment Act claims that are at issue here (see note 1, *supra*). Nevertheless, Congress's intent that Section 4 of ANCSA "be broadly construed to eliminate [*all* aboriginal claims and *all* aboriginal land titles] as any basis for any form

2. Petitioners nevertheless urge (Pet. 9-12) that the decision below conflicts with the many cases in which this Court has held that the contemporaneous administrative construction of an otherwise ambiguous statute is entitled to substantial deference by a reviewing court. Specifically, petitioners contend (Pet. 9, quoting Pet. App. 7a) that the court of appeals erred in "refus[ing] to defer" to one pre-Amendment and two post-Amendment decisions in which the Secretary granted allotments apparently without requiring personal occupancy because, the court found, those decisions " 'were unpublished and of little precedential value.' " [7] As we showed above (pages 5-7, *supra*), however, Section 2's "founded on occupancy" requirement, when properly viewed in the context of the Allotment Act as a whole, is not ambiguous. Moreover, the visibility of the decisions on which petitioners rely—as well as the extent to

---

of direct or indirect challenge to land in Alaska" (H.R. Conf. Rep. No. 92-746, 92d Cong., 1st Sess. 40 (1971) (emphasis in original)) is additional support for the refusal of the courts below to adopt petitioners' theory of "traditional native occupancy."

Indeed, petitioner Shields' tribe already has recovered more than $7.5 million for the government's taking of its aboriginal title to much of southeastern Alaska. *Tlingit & Haida Indians of Alaska* v. *United States*, 389 F.2d 778, 791 (Ct. Cl. 1968). That judgment included compensation for "14,956,312 acres in Tongass National Forest taken by Executive Proclamations" (*id.* at 781), including that of February 16, 1909 (*id.* at 782), by which the land sought by petitioners was withdrawn (see Pet. 3). See also *Tlingit & Haida Indians of Alaska* v. *United States*, 177 F. Supp. 452, 467-468 (Ct. Cl. 1959).

[7] Both courts below accepted petitioners' premise (Pet. 7) that these three allotment decisions recognized ancestral rather than personal occupancy as the basis for an allotment of forest lands under Section 2. See Pet. App. 7a; Supp. App. 10. For present purposes, we must also. We note, nevertheless, that the Department declined to accept the cases as precedent in part because that was not the clear basis for the decisions. *Louis P. Simpson*, 41 I.B.L.A. 229 (1975) (on Petition for Reconsideration). The IBLA further observed (*ibid.*) that the decisions "cannot bind the Department to perpetuate error."

which they represent a settled administrative practice—has particular significance to the question of statutory construction involved in this case since the 1956 Amendments were specifically intended to

> safeguard[] the national forests *by enacting into law the substance of present regulations which prohibit homestead selections in the national forests unless they are founded upon occupancy of the land prior to the establishment of the forest*, or unless the land selected is determined by the Secretary of Agriculture to be chiefly valuable for agricultural or grazing purposes, and which require the homesteader to prove 5 years' occupancy of the land.

H.R. Rep. No. 2534, 84th Cong., 2d Sess. 2 (1956) (emphasis added). Both courts below therefore properly examined the pre-1956 history of departmental regulations and decisionmaking and correctly concluded that Congress intended to require personal occupancy of the land sought prior to its withdrawal for the national forest as a prerequisite of allotment.

As the court of appeals noted (Pet. App. 6a), Interior's earliest regulations implementing the 1906 Allotment Act required that allotments within the national forests be "founded on *actual* occupancy prior to the establishment of the forest." See, *e.g.*, 51 Pub. Lands Dec. 145-146 (1925); 50 Pub. Lands Dec. 27, 48 (1923); 48 Pub. Lands Dec. 70, 71 (1921); 45 Pub. Lands Dec. 227, 246 (1916) (emphasis added). In context, the use of the word "actual" strongly suggests that occupancy by the applicant himself was required. Moreover, the same "actual occupancy" language was used to describe the requirement for an applicant's "preference right" to land "occupied by him" (Alaska Native Allotment Act, Act of May 17, 1906, ch. 2469, 34 Stat. 197), which, as we noted above (page 6, *supra*), plainly

stated a requirement of personal occupancy by the Native. See 50 Pub. Lands Dec. 27, 50 (1923); 48 Pub. Lands Dec. 70, 73 (1921).[8]

In 1935, the Department deleted the word "actual" from its regulations in favor of the "founded on occupancy" terminology (55 Pub. Lands Dec. 282, 283) that was used consistently in subsequent regulations (see, *e.g.*, 43 C.F.R. 67.7 (1955)) and ultimately incorporated in the Allotment Act by the 1956 Amendments. Neither court below regarded this change as one of substance, however, and petitioners have never relied on it as indicating an administrative intent to alter the requirements for allotment from personal to ancestry occupancy.

Rather, petitioners rely on *Jack Gamble*, Anchorage 017456 (Aug. 10, 1951), in which the Department apparently granted an allotment in the absence of proof that the applicant personally had occupied the land prior to the establishment of the national forest. In view, however, of the longstanding published administrative interpretation to the contrary—the only administrative construction of which Congress could have been aware when it stated its intent in 1956 (H.R. Rep. No. 2534, *supra*, at 2) to "enact[] into law the substance of present [Interior Department] regulations * * *"—petitioners' reliance (Pet. 7) on a single unpublished pre-Amendment decision is seriously misplaced. See

---

[8]Furthermore, since 1921 the Department's published decisions made clear, albeit in dictum, that it was the Native's personal occupancy of the land in question prior to its withdrawal for national forest purposes that entitled him to an allotment of it. See *Frank St. Clair*, 52 Pub. Lands Dec. 597, 598 (1929) ("[t]he Indian's alleged occupancy being prior to the establishment of the forest, he had a preference right to an allotment not affected by the withdrawal"); *Yakutat & Southern Ry.* v. *Setuck Harry, Heir of Setuck Jim*, 48 Pub. Lands Dec. 362, 364 (1921) ("[t]he land applied for was occupied by the Indian prior to the forest reservation, and owing to his continuous use, it appears that he is entitled to a preference right as granted by the statute").

Watt v. *Western Nuclear, Inc.*, No. 81-1686 (June 6, 1983), slip op. 9-10 & n.7.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

F. HENRY HABICHT, II
Acting Assistant Attorney General

JACQUES B. GELIN
MARTIN W. MATZEN
Attorneys

JULY 1983

---

[9]To whatever extent petitioners continue to rely on *Charles G. Benson*, Juneau 011549 (Aug. 24, 1961), and *John Littlefield*, Anchorage 133471 (Apr. 28, 1961), that reliance also is misplaced. As petitioners themselves acknowledge (Pet. 9 n.8; emphasis added), it is the pre-Amendment administrative practice that is relevant to this case "because Congress expressly intended to enact the substance of *existing* administrative regulations."

DOJ-1983-07

No. 82-1807

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALBERT SHIELDS, JR., HEIR OF
ALBERT SHIELDS, SR., et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,
et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

CRAIG J. TILLERY
615 H Street, Suite 100
Anchorage, Alaska 99501
(907) 272-9431
Counsel for Petitioners

September 1983

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 82-1807

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALBERT SHIELDS, JR., HEIR OF ALBERT SHIELDS, SR., et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

CRAIG J. TILLERY
615 H Street, Suite 100
Anchorage, Alaska 99501
(907) 272-9431
Counsel for Petitioners

September 1983

ARGUMENT IN REPLY

In the Brief for Respondents in Opposition ("Opp. Br."), the government argues, primarily through footnotes, that the decision of the court of appeals in this case was both insignificant and correct. That argument misapprehends, in large part, the factual and legal basis of the Petition.

Initially, the government argues in footnote 4 of its brief that this case is of little significance. In their Petition, the applicants noted that in a separate class action, *Akootchook v. Watt,* No. F-82-4 (D. Alaska, filed Jan. 15, 1982) (appeal filed Sept. 12, 1983), the government argued that *Shields* precluded the granting of allotments to over 150 applicants. In response the government here stated that since no decision had been issued in *Akootchook,* the effect of *Shields* was "speculative." Opp. Br. at 4 n.4. While true at the time its brief was filed, the question is no longer speculative. On August 5, 1983, the district court ruled against the plaintiffs in *Akootchook,* basing its decision squarely on *Shields.* See *Akootchook v. Watt,* No. F-82-4, Mem. Opinion at 8 (D. Alaska, August 5, 1983). The court expressly stated:

> Plaintiffs now make the same argument to this court that they made at the administrative proceedings, *i.e.,* that they met the use requirement in section three of the Alaska Native Allotment Act by tacking the rights of prior entrymen. The court disagrees with plaintiffs. A recent Ninth Circuit case makes it clear that allotments under the Act must be based on personal occupancy and may not be acquired through tacking ancestral occupancy rights. *See Shields v. United States,* 698 F.2d 987, 989 (9th Cir. 1983). Accordingly, it is proper to grant summary judgment to defendants to the effect that the lands at issue are not available for allotment by applicants whose individual use and occupancy began after Pickett Act withdrawals.

Id.

Respondents further contended that even if *Shields* governs *Akootchook*, only a few persons are affected. This is incorrect. As noted the class is estimated to consist of over 150 individuals. Moreover, as the government acknowledged in *Akootchook*, the court's decision will certainly control on all other applications located on other types of withdrawals.

The government further argues that the applications for allotments are unimportant because of benefits granted Natives under the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. § 1601 *et seq.* (Supp. 1983). To the extent the government refers to non-land benefits, such as stock, this argument is illogical. There is no relation between economic benefits of ANCSA and the granting of title to subsistence lands under the Allotment Act. By analogy, could one seriously argue, to a white applicant, that denial of a homestead or mining application is unimportant because Congress enacted a Medicare or food stamp program for which he may be eligible? The answer is clearly no. The various benefits are not mutually exclusive.

Regarding land benefits under ANCSA, the government apparently does not understand how that act works. First, allotment applications may be granted for 160 acres which may consist of four 40-acre tracts. Section 14(c)(1) conveyances under ANCSA, in contrast, have been limited in almost all situations to one five-acre tract. Moreover, in Southeast Alaska, where virtually all class members are located, a separate impediment exists. Because many of the allotment applications are for land across waterbodies from the villages, they are not located on land withdrawn under section 11 of ANCSA, 43 U.S.C. § 1610 (Supp. 1983). In fact, computer abstracts furnished by the Department of the Interior indicate that only 25 percent of the allotments ever filed within the Tongass National Forest are on land selected by village corporations. Section 14(c)(1) conveyances are only available on land conveyed to village corporations. See 43 U.S.C. §

1613(c)(1) (Supp. 1983).

In arguing the correctness of the decision of the court of appeals, the government focuses primarily on the language and structure of the Allotment Act. The government notes that three phrases in the Act refer to occupancy. Two of them unequivocally state a requirement of personal occupancy — that is, the land must be occupied both presently and for a period of five years previously by the applicant. The third occupancy phrase, that concerning national forests, contains no words indicating personal use is required. From this the government concludes that Congress must have intended all three phrases to mean the same. Petitioners respectfully disagree. Congress clearly knew how to require personal occupancy; the fact that it did not use such language with respect to national forest land suggests that it intended something different.

Petitioners argued to the court of appeals that unless the occupancy requirement of section 2 is read to require only *ancestral* occupancy, the additional requirement of five years occupancy found in section 3 would be rendered meaningless.[1] In response the court implicitly agreed that under the government's construction, section 3 would be meaningless in light of section 2 *if* applied to national forests, but found that it has meaning as applied to non-forest land. Appendix to Petition for Writ of Certiorari at 5a. This analysis is unpersuasive because it ignores the fact that sections 2 and 3 were enacted as part of the same subsection in the 1956 amendments for the *specific purpose* of dealing with allotments on national forest land. H.R. Rep. No. 2534, 84th Cong., 2d Sess. (1956), CR 27, ex. 11, at 2-3.

---

[1] This is because at the time of passage of the 1956 amendments, the Tongass and Chugach Forests were 47 and 30 years old respectively. Thus a requirement of personal occupancy prior to establishment of the forests would itself require a minimum of 30 years personal occupancy by the applicant.

The government apparently recognizes this logical flaw and attempts to deal with it by arguing, in footnote 5 of its brief, that the two requirements protected forest lands in that they served to assure that an applicant's occupancy both antedated the land's inclusion in the forest and continued for a period of five years. Opp. Br. at 7 n.5. This argument is similarly illusory. If the occupancy of a Native in 1956 predated a withdrawal made no later than 1926, by definition it continued for five years. Quite clearly, as construed by the government, section 3 of the Allotment Act played no role in protection of the forests. That is contrary to the express statement of the Congress. H.R. Rep. No. 2534, 84th Cong., 2d Sess. (1956), CR 27, ex. 11, at 2-3.

In footnote 6 of their brief, respondents suggest that petitioners would equate "occupancy" as used in section 2 of the Allotment Act with aboriginal title. Petitioners do not now make, nor have they ever made, such a claim. Rather, they have consistently argued that Congress intended to require actual occupancy by individual Natives of a discrete parcel of land. In no sense do they contend that a vague exercise of dominion over the land will suffice.

Finally, respondents take issue with petitioners' reliance on administrative interpretation immediately prior and subsequent to the 1956 amendments. As petitioners noted, Congress intended to enact the substance of existing administrative regulations. The *only* prior interpretation of those regulations, *Jack Gamble*, A-017456 (Aug. 10, 1951), held precisely what petitioners argue — that ancestral, not personal, use is required in a national forest. The government argues, however, that Congress could hardly have been aware of the *Gamble* case. This argument is feckless. The *Gamble* decision was not made by a low-level regional department employee, but rather, on appeal by the Director of the Bureau of Land Management. It is inconceivable that in enacting a bill written and advocated by the Department of the Interior, the Congress could not have been aware of a recent interpretation of a key provision of that bill by one of the highest officials of that Department.

The government dismisses the administrative interpretations, which support petitioners' contentions, immediately subsequent to enactment of the 1956 amendments as irrelevant "because Congress expressly intended to enact the substance of existing administrative regulations." This totally misses the point. The subsequent interpretations are also relevant because they are a contemporaneous construction made by the agency which participated in the enactment of the bill and which was charged with its execution. As such they are due deference by the courts. *Udall v. Tallman,* 380 U.S. 1 (1965).

Respectfully submitted,

CRAIG J. TILLERY
615 H Street, Suite 100
Anchorage, Alaska 99501

Counsel for Petitioners

September 1983